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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Kenneth and Mary Nichols, husband and
10 wife; Larry and Marsha Hilcher, husband
and wife,

11 Plaintiffs,

12 v.

13 First American Title Insurance Company, a
14 company doing business in Arizona, et al.,

15 Defendants.

No. CV-12-08258-PCT-GMS

ORDER

16
17 Pending before the Court is Defendant First American Title Insurance Company's
18 ("First American") Motion to Dismiss (Doc. 5) and Plaintiffs' Motion to Amend (Doc.
19 10). For the reasons discussed below, Plaintiffs' Motion to Amend is granted and First
20 American's Motion to Dismiss is denied without prejudice.

21 Plaintiffs in the instant action are four individuals, comprised of two married
22 couples, who entered into a Deed of Trust ("DOT") with Quintero Golf & Country Club
23 ("Quintero") and First American. The purpose of the DOT was to secure a promissory
24 note executed by Quintero in Plaintiffs' favor in the amount of \$7,000,000.00. (Doc. 1-1
25 at 4, ¶ 7.) Whenever Quintero sold a parcel of the property subject to the DOT, a Deed of
26 Partial Release and Partial Reconveyance was issued for Plaintiffs' signatures. (*Id.* at 4, ¶
27 8.) According to Plaintiffs, First American was obligated to disburse some of the
28 payment received by Quintero to Plaintiffs. (*Id.*) Plaintiffs allege that First American has

1 failed to disburse the funds rightfully owned by Plaintiffs. They set out seven different
2 occasions involving the sale of seven parcels in which First American failed to disburse
3 funds to Plaintiffs. (*Id.* at 2, ¶ 9–4, ¶ 16.) Plaintiffs filed suit against First American on
4 December 21, 2012, asserting claims for breach of contract and breach of implied
5 covenant of good faith and fair dealing. (*Id.* at 6–8.) On December 28, 2012, before filing
6 an Answer, First American filed a Motion to Dismiss. (Doc. 5.) Plaintiffs subsequently
7 moved to amend their Complaint. (Doc. 10.)

8 First American opposes Plaintiffs’ Motion to Amend Complaint on the ground that
9 amendment would be futile for the reasons set forth in its Motion to Dismiss. (Doc. 12 at
10 1.) However, Federal Rule of Civil Procedure 15(a)(1) provides that a party may amend
11 its pleading once as a matter of course if no responsive pleading has been served or if less
12 than twenty days have passed since the initial pleading was served. Here, no responsive
13 pleading has been served as First American has not yet filed an Answer to Plaintiffs’
14 Complaint. “[L]eave to amend should be granted as a matter of course, at least until the
15 defendant files a responsive pleading.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d
16 604, 607 (9th Cir. 1992). Plaintiffs’ Motion to Amend is therefore granted.

17 First American contends that Plaintiffs should not be allowed to file an Amended
18 Complaint because all claims in the Complaint are time-barred, and thus any amendment
19 would be futile. (*Id.*) First American’s Motion to Dismiss is also based largely on this
20 argument.¹ (*See* Doc. 12.) For the reasons discussed below, The Court does not accept
21 First American’s argument that Plaintiffs’ claims are time-barred at this stage of the
22 proceedings.

23 “[T]he statute of limitations defense . . . may be raised by a motion to dismiss . . .
24 [i]f the running of the statute is apparent on the face of the complaint.” *Jablon v. Dean*

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26 ¹ First American’s Motion to Dismiss also asserted that Plaintiffs failed to plead
27 with specificity the existence of a contract. (Doc. 5 at 5.) However, Plaintiffs’ Proposed
28 Amended Complaint fixes this problem. (Doc. 10-1 at 5–6.) First American does not
mention the defect in its Opposition to Plaintiffs’ Motion to Amend and Reply in Support
of its Motion to Dismiss. (*See* Doc. 12.)

1 *Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (citing *Graham v. Taubman*, 610 F.2d
2 821 (9th Cir. 1979)). However, even if the relevant dates alleged in the complaint are
3 beyond the statutory period, the “complaint cannot be dismissed unless it appears
4 beyond doubt that the plaintiff can prove no set of facts that would establish the
5 timeliness of the claim.” *Hernandez v. City of El Monte*, 138 F.3d 393, 402 (9th Cir.
6 1998) (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir.
7 1995); see *Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993). Indeed,
8 “[d]ismissal on statute of limitations grounds can be granted pursuant to Fed. R. Civ.
9 P. 12(b)(6) ‘only if the assertions of the complaint, read with the required liberality,
10 would not permit the plaintiff to prove that the statute was tolled.’” *TwoRivers v. Lewis*,
11 174 F.3d 987, 991 (9th Cir. 1999) (citing *Vaughan v. Grijalva*, 927 F.2d 476, 478 (9th
12 Cir. 1991) (quoting *Jablon*, 614 F.2d at 682)); see *Pisciotta v. Teledyne Indus., Inc.*, 91
13 F.3d 1326, 1331 (9th Cir. 1996). “Because the applicability of the equitable tolling
14 doctrine often depends on matters outside the pleadings, it is not generally amenable to
15 resolution on a Rule 12(b)(6) motion.” *Hernandez*, 138 F.3d at 402 (quoting *Supermail*
16 *Cargo*, 68 F.3d at 1206); see *Federal Civil Procedure Before Trial* § 9:194, at 9-48,
17 §9:214.1, at 9-57.

18 First American contends Arizona’s six-year statute of limitations for contracts
19 claims applies to bar Plaintiffs’ claims of breach. First American requests that the Court
20 take judicial notice of the seven warranty deeds for the sales of parcels in which Plaintiffs
21 claim First American wrongfully withheld proceeds from Plaintiffs. First American
22 asserts that all seven of the warranty deeds were executed in 2004, and that Plaintiffs’
23 causes of action accrued on the date of each breach. Thus, First American argues,
24 Plaintiffs’ causes of action were time-barred as of 2010. However, First American
25 provides no support for its assertion that Plaintiffs’ causes accrued on the date of the
26 execution of the warranty deed.

27 Arizona applies the discovery rule to breach of contract claims. *Gust, Rosenfeld &*
28 *Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995).

1 Under that rule, “a plaintiff’s cause of action does not accrue until the plaintiff knows or,
2 in the exercise of reasonable diligence, should know the facts underlying the cause.” *Id.*
3 at 966 (citing 2 Calvin W. Corman, *Limitations of Actions* § 11.1.1 (1991)). The
4 discovery rule, like the doctrine of equitable tolling, “often depends on matters outside
5 the pleadings,” and thus cannot usually be resolved on a 12(b)(6) motion to dismiss. *See*
6 *Hernandez*, 138 F.3d at 402.

7 Here, Plaintiffs’ Proposed Amended Complaint states that the seven warranty
8 deeds were all dated in 2004. (Doc. 10-1 at 3–5.) However, nothing on the face of the
9 Complaint suggests that Plaintiffs discovered First American’s wrongdoing as of the date
10 of the warranty deed. The Complaint merely alleges that First American received the
11 proceeds from each of the sales and wired the Plaintiffs’ funds to Hillcrest Bank. (*Id.*)
12 Nothing in the Complaint suggests that, at the time that each warranty deed was executed,
13 Plaintiffs knew that First American received the proceeds and wrongfully withheld them
14 or that Plaintiffs were even notified when a sale was made. As such, it is not “beyond
15 doubt that the plaintiff can prove no set of facts that would establish the timeliness of the
16 claim.” *Hernandez*, 138 F.3d at 402. First American’s Motion to Dismiss on this ground
17 is therefore denied. For the same reason, First American’s opposition to Plaintiffs’
18 Motion to Amend is rejected.

19 First American further asserts that Plaintiffs’ Complaint should be dismissed
20 because their claims are barred by the equitable doctrine of laches. (Doc. 5 at 9.) “Laches
21 will generally bar a claim when the delay in filing suit is unreasonable and results in
22 prejudice to the opposing party.” *League of Ariz. Cities and Towns v. Martin*, 219 Ariz.
23 556, 558, 201 P.3d 517, 519 (2009) (citing *Sotomayor v. Burns*, 199 Ariz. 81, 83, 13 P.3d
24 1198, 1200 (2000)). “[A] claim of laches depends on a close evaluation of all the
25 particular facts in a case” and thus is rarely appropriate for resolution at the motion-to-
26 dismiss phase. *Kourtis v. Cameron*, 419 F.3d 989, 1000 (9th Cir. 2005) *abrogated on*
27 *other grounds by Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155
28 (2008). In asserting the defense of laches at this stage, “the defendant must rely

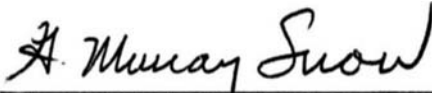
1 exclusively upon the factual allegations set forth in the complaint.” *Id.*

2 First American claims that Plaintiffs “should have known after each of the seven
3 transactions in 2004 that they did not receive the money owed.” (*Id.* at 9–10.) Again,
4 First American fails to cite any authority for this proposition. The unreasonableness of
5 any delay under the doctrine of laches depends on “the justification for delay, including
6 the extent of plaintiff’s advance knowledge of the basis for the challenge.” *Martin*, 201
7 P.3d at 519. As discussed above, nothing on the face of the Complaint shows that
8 Plaintiffs had any advance knowledge of the basis of their breach claims, much less what
9 kind of justification might exist for their delay. Once more, it is not “beyond doubt that
10 the plaintiff can prove no set of facts that would establish the timeliness of the claim.”
11 *Hernandez*, 138 F.3d at 402. First American’s Motion to Dismiss on this ground is
12 therefore denied.

13 **IT IS THEREFORE ORDERED** that Defendant First American’s Motion to
14 Dismiss (Doc. 5) is **DENIED Without Prejudice**.

15 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion to Amend (Doc. 10) is
16 **GRANTED**.

17 Dated this 6th day of March, 2013.

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21 G. Murray Snow
22 United States District Judge
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